In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1379

TAHOE NUGGET, INC. d/b/a
JIM KELLEY'S TAHOE NUGGET,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NEVADA LODGE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The Petitioners, TAHOE NUGGET, INC. d/b/a JIM KELLEY'S TAHOE NUGGET and NEVADA LODGE, respectively pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 10, 1978.

OPINION BELOW

The opinion of the Court of Appeals is reported at 584 F.2d 293. A copy appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 10, 1978. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on October 20, 1978. A copy of the order denying rehearing appears in the appendix hereto. Mr. Justice Rehnquist on January 9, 1979, granted a timely application for extension of time for filing this petition to and including March 10, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether there is a conflict between the decision sought here to be reviewed and decisions on the same matter of federal law of other Courts of Appeals.

2. Whether there is a conflict between panels of the Court below on the same matter of federal law.

3. Whether there is a conflict between the decision here rendered by the National Labor Relations Board (the Board) and other decisions on the same issue rendered by the Board.

4. Whether the Court below was in error in holding that the Board may ignore federal law and for policy reasons establish a presumption based upon two other presumptions.

5. Whether the Board may establish a rebuttable presumption to which it gives mere lip service and which in actual practice as applied by it is an absolute and irrebuttable presumption resulting in a denial of due process.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C., Constitution, Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

> in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 29:

> § 158(a)(5): It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .
>
> § 160(b): Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

STATEMENT OF THE CASE

Prior to September 18, 1974, Petitioners were members of a multi-employer unit known as the Reno Employers Council (the Council). On September 17, 1974 and September 18, 1974, TAHOE NUGGET and NEVADA LODGE, respectively, timely withdrew from the multi-employer unit and the Council. From 1962 to the respective dates of their withdrawals, Petitioners were represented by the Council in collective bargaining and were parties to the Council's

multi-employer collective bargaining agreement with Local 86 of the Hotel-Motel-Restaurant Employees and Bartenders International Union (the Local). Thereafter, the Petitioners' status was that of a single employer unit.

Based upon certain information which came to their respective attention, the managers of each Petitioner had a good faith doubt as to whether the Local continued to represent a majority of their employees. This prompted the withdrawal from the multi-employer unit.

There had never been a representation election, either in the larger unit or the individual units. By letter, on the dates mentioned, each Petitioner informed the Local of its withdrawal from the Council and the multi-employer unit, and that they were terminating the existing collective bargaining agreement effective as of the end of the term thereof. Subsequently, the Local's attorney wrote each Petitioner requesting that individual bargaining take place. Petitioners' attorney responded on behalf of each that they had a genuine doubt that the Local represented an uncoerced majority in an appropriate unit and urged the Local to petition for an election to demonstrate whether in fact they represented a majority. Petitioners, through their attorney, also offered to cooperate to expedite an election. The response of the Local was to file a refusal to bargain charge against each Petitioner.

The Regional Director of the Board dismissed the charges on the ground that objective considerations properly prompted the Petitioners to question in good faith the Local's majority status, and accordingly the presumption of continuing majority had been rebutted. The Local appealed this ruling to the General Counsel of the Board who reversed the Regional Director and ordered that she issue a complaint for a hearing before an Administrative

Law Judge. Thereupon, before the complaint was issued, Petitioners filed petitions for a representation election. The Regional Director refused to process them on the ground that the charges blocked the election. The Local refused to withdraw the charges or to proceed to an election.

The Administrative Law Judge determined that Petitioners had violated the National Labor Relations Act [61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 15, *et seq.*, §§ 158(a)(1) and (5)] by refusing to bargain. The Judge's finding was based upon a presumption that the Local continued to represent a majority of each Petitioners' employees by reason of the multi-employer contract and that by derivation the presumption applied to the new single employer units. He concluded that the burden was upon Petitioners to prove that their refusal to recognize and bargain with the Local was based upon "a reasonably grounded good faith doubt" that the Locals no longer continued to represent a majority of the employees of each Petitioner. He then proceeded to discuss each objective consideration in isolation and concluded that Petitioners had not rebutted the presumption.

The Board, with one member dissenting, affirmed the Administrative Law Judge. The Court below in enforcing the Board's order took the same approach as did the Administrative Law Judge in analyzing the objective considerations.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Application of the Presumption of a Union's Continuing Majority Status.

The decision of the Court below is in conflict with the Sixth, Seventh, Eighth and District of Columbia Circuits.

The Court below concedes, as we shall point out, *infra*, that it is in conflict with, at least the Sixth Circuit. The Court, as did the Board, not only departed from and ignored prior precedent as we shall discuss, *infra*, but treated each objective consideration which led Petitioners to raise in good faith their belief that the Local no longer represented a majority of their respective employees, in isolation rather than dealing with their cumulative effect. As pointed out by the dissenting Board member, there was placed in the record before the Board the evidence available to Petitioners supporting their position which gave rise to their doubt as to the Union's majority status. 227 NLRB 359. Such evidence consisted of: (1) that the Local through its trustee publicly stated the Local represented only 20% of the employees in the multi-employer unit, (2) statements by employees that they were dissatisfied with the Local, (3) the Local mounted a desperate membership drive at the time they were demanding continuing recognition, (4) high employee turnover, (5) reports of employees dissatisfaction with the Local, (6) reports of the Local's inactivity, (7) no dues checkoff, (8) low level of membership among Petitioners' employees, (9) there never had been a representation election, (10) the Local had never been certified, (11) admissions by the Local's representative of the Local's lack of support, and (12) the change from a multi-employer unit to a single employer unit.

The Sixth Circuit in *N.L.R.B. v. Richard W. Kaase Company*, 346 F.2d 24 (C.A. 6, 1965) in dealing with the presumption of a union's continuing majority status, held that withdrawal from a multi-employer unit invalidated the presumption. The Court said there could be no presumption of continuance of a union's majority status as to a single employer after a year following certification of the union in a multi-employer election of which the

employer had been a part. The Court held that before the Board could find the employer in violation of the Act by its refusal to bargain, it is essential to find that at the time of the refusal the union in fact enjoyed a majority status. This burden of so proving, said the Court, was upon the General Counsel. It was there stated (at 31):

> . . . the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer. Before the continuance of the fact of majority support can be presumed, the original existence of that fact must be established.

In *Ingress-Plastene, Inc. v. N.L.R.B.*, 430 F.2d 542 (C.A. 7, 1970), denying enforcement, the Seventh Circuit in considering the objective considerations which there led the employer to question the union's continuing majority status, said (at 547):

> Although the Board attacks each of the reasons advanced by the company in support of its good faith doubt of the union's majority status, the company does not rely on any one reason alone, but rather on all as a whole. We think the entire record, including evidence against the Board's position as well as in favor of it . . . supports the company's position.

Similarly, *Star Mfg. Co., Div. of Star Forge, Inc. v. N.L.R.B.*, (C.A. 7, 1976) 536 F.2d 1192, 1196.

In the instant case the Petitioners did not rely on any one reason alone, although they could have under Board precedent as we will show, but rather on all as a whole.

The Eighth Circuit in *National Cash Register Company v. N.L.R.B.*, 494 F.2d 189 (C.A. 8, 1974) reversed a finding of refusal to bargain and denied enforcement, holding the

employer on the collective basis of four factors could raise a question as to the union's majority status.

The District of Columbia Circuit in accord with the Sixth, Seventh and Eighth Circuits, held an employer who relied upon the cumulative effect of multiple objective considerations, properly raised a good faith doubt as to the union's majority status. *Lodges 1746 & 743, Int. Ass'n. of Mach. & Aero. Wkrs. v. N.L.R.B.*, 416 F.2d 809 (C.A.D.C., 1969).[1]

One of the objective considerations which Petitioners considered was the fact that at the time (14 years previously) they joined the multi-employer unit, the Local did not represent a majority of either of their employees. The Board rejected this evidence on the ground that Section 10(b) of the Act [29 U.S.C. § 160(b)] precluded any attack on the original recognition by the employer. Section 10(b) is the so-called six months statute of limitations under the Act. The Court below agreed with the Board. Here again we have a conflict between Circuits as to the application of 10(b) under the circumstances. In *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (C.A. 6, 1973), the Sixth Circuit in considering the same argument advanced by the Board in the same type of case, denied enforcement of the Board's order to bargain, holding (at 333):

> The fact that this evidence [relating to initial recognition] could have been the basis of an unfair labor practice charge in 1967 is coincidental and ought not to render the evidence inadmissible for another purpose.

1. See also, *N.L.R.B. v. Nu-Southern Dyeing & Finishing Inc.*, (C.A. 4, 1971) 444 F.2d 11, in which enforcement of a refusal to bargain order was denied where an employer questioned the union's continuing majority status based on several factors, including an anti-union petition signed by a majority of employees which the Board refused to consider on the ground that the anti-union petition was the result of the employer's 8(a)(1) violations. The Court held that there were factors other than the anti-union petition, which when viewed in their combined effect, established that the company "possessed a good faith doubt of the union's majority status at the time of the refusal to bargain" (at 16).

The Board in reaching its conclusion relied upon this Court's opinion in *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 80 S.Ct. 822 (1960).[2] The Court in *Dayton Motels, supra*, distinguished *Local Lodge No. 1424*, rightfully pointing out that it represented a different factual situation to which this Court addressed itself and that it did not preclude the use of all evidence relating to events which transpired more than six months prior to the filing of an unfair labor practice charge (474 F.2d at 333):

> In our case, however, the Company's defense is not dependent on the time-barred unfair labor practice. The evidence was offered, to be considered along with other evidence, of its good-faith doubt about the majority status of the Union.

With respect to the Board's argument, the Sixth Circuit stated (at 333-334):

> Hence, as the Board would have it, an employer who had to decide, at the expiration of an initial contract, whether to continue recognition of an incumbent Union, would have to approach the problem in the following manner: The employer would first look at the events surrounding the initial recognition of the Union to see if those events could cast doubt on the representative status of the Union. He would then have to decide whether those facts also would have supported an unfair labor practice charge. If they did not reach the level of proscription under the Act, he could take them into account. If they constituted an unfair labor practice, he could not use them in making his decision.

2. Sometimes referred to as the *Bryan* case.

> Such an artificial standard is obviously impractical and one which is well nigh impossible to be complied with. It would substantially impair, if not obliterate, the efficacy of the defense of good-faith doubt. *Bryan* did not involve the exclusion of evidence of good-faith doubt.

As mentioned, the Court below concedes that it is in conflict with the Sixth Circuit. In referring to *N.L.R.B. v. Dayton Motels, supra,* the Ninth Circuit states that the Sixth Circuit "misperceives the essence of the good faith criterion." (Appendix A, p. 8) It also states that its construction of the reasonable doubt defense is more preferable than that of the other Circuits. (Appendix A, p. 10) It comments that "some courts view these [good faith doubt] as complete defenses; other courts say they simply shift the burden to the General Counsel." (Appendix A, pp. 5-6) The Ninth Circuit agrees with neither approach. It states, in taking a different approach from that of the other Circuits, that its "conclusion is buttressed by pragmatic considerations." (Appendix A, p. 12)

In light of the obvious conflict between the Ninth Circuit and the other Circuits mentioned, this Court should resolve the conflict. The issue is a recurring one in the administration of the National Labor Relations Act. There are currently pending before the Ninth Circuit eight cases which involve the same issue and one in the District of Columbia Circuit. The resolution of the issues involved should not have to depend upon the fortuitous circumstance as to which Circuit may be dealing with them.

There Is a Conflict Among Panels of the Court Below on the Issue of Rebutting the Presumption.

In its earlier decision, the Court below held in *Dalewood Rehabilitation Hospital, Inc. v. N.L.R.B.*, (C.A. 9, 1977) 566 F.2d 77 that a combination of factors is adequate to

provide a basis for an employer's good faith doubt as to a union's majority status when each factor considered alone is insufficient. In denying enforcing of a bargaining order by the Board, the panel of the Court stated (at 79-80):

> The Board concluded that each factor considered separately did not give petitioner reasonable grounds to doubt the Union's majority status and that the evidence as a whole was no greater than the sum of its separate parts.
>
> • • •
>
> The Hospital contends that all of the factors the administrative law judge considered, taken together, provided the basis for a reasonable doubt of the Union's majority status.
>
> The courts require an assessment of the cumulative force of the combination of factors. [Citations] Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate. [Citation]
>
> We believe the combination here was adequate. The employee complaints, the turnover, the deauthorization vote and the decline in the number of authorized dues checkoffs all indicate a loss of Union support.
>
> We hold that the Hospital rebutted the presumption of continued majority status. The burden then shifted to the Board to prove that the Union represented a majority on the day the Hospital refused to bargain. [Citation]

Yet, the panel below considered each of the numerous factors in separate isolation, as did the Board, and concluded they were not sufficient for a good faith doubt of the Local's majority status. The factors here were equal to and in excess of those in *Dalewood Rehabilitation Hospital, supra.* This, apart from the fact that the Board laid down the principle in *Celanese Corporation of America,* 95 NLRB 664 (1951) which we shall discuss more fully

infra, that the answer to the question of whether an employer has violated Section 8(a)(5) of the Act, depends not on whether there was sufficient evidence to rebut the presumption of the union's continuing majority status, but upon whether the employer in good faith believed that the union no longer represented the majority of the employees. It is also significant that the Regional Director of the Board based upon the Board's prior decisions and upon the factors which motivated the Petitioners, concluded there was no violation of the Act by Petitioners and dismissed the unfair labor practice charges.

In view of the evident conflict between panels of the Court below, this matter should at least be remanded so the Court of Appeals can reconcile its internal difficulties. *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S.Ct. 633, 634 (1957); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 260, 73 S.Ct. 656, 663 (1953).

The Board's Decision Is in Direct Conflict with Its Prior Holdings on the Same Issue.

In its seminal decision adopting its presumption relating to a union's continuing majority status, the Board in *Celanese Corporation of America*, 95 NLRB 664 (1951), stated:

> We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 depends, *not on whether there was sufficient evidence to rebut the presumption of the Union's continuing majority status or to demonstrate that the Union in fact did not represent the majority of the employees, but upon whether the Employer in good faith believed that the Union no longer represented the majority of the employees.* The latter point was not considered by the Trial Examiner. [Part of emphasis added] 95 NLRB at 665, 28 LRRM at 1365.

In the instant case the Board departed from its holding in *Celanese* by determining whether there was sufficient evidence to rebut the presumption. It analyzed in isolation each objective consideration which Petitioners had considered in reaching their good faith doubt. The Court below did likewise. It is to be noted the Board held in *Celanese* that the answer lies in whether "the *employer in good faith* believed that the Union no longer represented the majority of the employees." There was no finding, and there could be none, that Petitioners did not in good faith believe the Local no longer represented a majority of their respective employees. It is clear that what the Board said in *Celanese* was that the presumption is overcome if the employer in good faith believes there is doubt as to the union's majority status. Yet, the Board and the Court below substituted their judgment as to good faith belief. The criteria is not what the Board or the Court below, if they had to determine whether there was doubt, would conclude.

Neither the Board nor the Court rationalized their departure from *Celanese* which has not been overruled nor modified. In fact, the Court below did not ever consider *Celanese*. As stated in *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1341 (C.A.D.C., 1972) in which the Board was reversed:

> It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them. *See, e.g.*, Secretary of Agriculture v. United States, 347 U.S. 645, 653, 74 S.Ct. 826, 98 L.Ed. 1015 (1954).

Similarly, the Court in *Teamsters Local 769 v. N.L.R.B.*, 532 F.2d 1385 (C.A.D.C., 1976) again reversing the Board, held (at 1392):

> But the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them. Thus, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[3]

Moreover, in dealing with objective considerations, the Board in *Celanese, supra,* said that whether an employer has questioned a union's majority in good faith "can only be answered in the light of the totality of all the circumstances involved." Yet, the Board and the Court below failed to follow this principle and viewed in isolation each of the numerous factors which impelled the Petitioners to question in good faith whether the union continued to represent a majority.

Assuming, *arguendo,* that the Court below and the Board could, as they did, examine each objective consideration, in so doing they ignored prior Board precedent. Under its precedents in effect at the time Petitioners questioned the Union's majority status, each of the objective considerations which came to their attention were equal to or exceeded what the Board regarded as valid objective considerations at the time. In effect, the Board, without any rationalization, did a full switch in its position. The Court below did not deal with this fact, although brought to its attention.

As to the individual factors which constituted the objective considerations, Petitioners proved: (1) that no election was ever held among the employees to determine whether they wanted to be represented by the Local; *Taft Broadcasting,* 201 NLRB 801 (1973); *Nu-Southern Dyeing & Finishing, Inc.,* 179 NLRB 573 (1969); (2) that a substan-

3. Citing *Greater Boston TV Corp. v. FCC,* (C.A.D.C. 1970) 444 F.2d 841, 852, cert. denied, 403 U.S. 923, 91 S.Ct. 2299, 2233.

tial number of employees complained to management that they were dissatisfied with the Local and did not want the Local to represent them; *Peoples Gas System, Inc.,* 214 NLRB 944 (1974); *Southern Wipers, Inc.,* 192 NLRB 816 (1971); (3) that during the period of the latest collective bargaining agreement there was a turnover of 80 to 100 percent among the employees; *Peoples Gas System, supra, Southern Wipers, Inc., supra*; (4) that during the period the collective bargaining agreement had been in effect, the Local never attempted to enforce its provisions by either inspecting the premises or soliciting grievances from employees and never filed a single grievance; *Lloyd McKee Motors, Inc.,* 170 NLRB 1278 (1968); *Peoples Gas System, Taft Broadcasting* and *Southern Wipers, Inc.,* each *supra;* (5) that the Local had experienced serious financial difficulties occasioned by a substantial loss of members; *Peoples Gas System, Taft Broadcasting,* both *supra, Viking Lithographers,* 184 NLRB 139 (1970); (6) that the Local was placed in trusteeship because of the inability of its officers and business representatives to secure support from the employees employed in Northern Nevada, *Peoples Gas System, Taft Broadcasting, Viking Lithographers,* all *supra;* (7) that the Local conceded that only 20% of the employees involved were unionized and the Local was mounting a desperate organizing campaign, *Peoples Gas System, supra;* (8) that at the time Petitioners voluntarily recognized the Local by joining the multi-employer unit, the Local did not represent a majority of either Petitioners' employees; and (9) the substantial and material change from being a part of a multi-employer unit to a single unit employer, *Peoples Gas System, supra.*[4]

4. In the spring of 1974, the same year in which Petitioners questioned the Local's majority status, the Local called a meeting and none of Petitioners' employees attended [Appendix A, p. 25].

As pointed out in *Zim's Foodliner, Inc. v. N.L.R.B.* (C.A. 7, 1974) 495 F.2d 1131, 1140:

> The Board has held that even informal employee statements to the employer regarding employee sentiment may provide a basis for good faith doubt. *Wallace Co.*, 174 NLRB 416 (1969).

In December 1974, when Petitioners challenged the Local's majority status, it relied on factors which were then Board law and which factors were individually and, at least, collectively sufficient to support their good faith doubt of the Local's continuing majority. As was so aptly put by the Court in the very recent decision of *Marshall v. Baltimore & Ohio Railroad Co.* (D.C. Md. #N-74-637, Dec. 5, 1978), "individuals and businesses are entitled to rely on interpretations of existing law in arranging their activities."

The Board's Derivative Presumption Is Contrary to Federal Law and Is Impermissible.

The Board in the instant cases in fashioning a so-called derivative presumption, adopted the erroneous rationale of the Administrative Law Judge whose brainchild it was:

> However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a *derivative presumption* of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. *Jim Kelley's Tahoe Nugget*, 227 NLRB 357, 363 (1976); *Nevada Lodge*, 227 NLRB 368, 374 (1976). [Emphasis supplied]

Board member Walther in attacking this novel and legally contrary approach, noting that in all of the 14 years of the multi-employer relationship there never was any

attempt to ascertain the majority sentiments of the employees, states:

> I take issue with my colleagues' conclusion that the presumption of majority status flowing from the contract in the multi-employer unit survives Respondent's timely withdrawal from that unit. By a process resembling alchemy, my colleagues have concocted the existence of majority status with only the thinnest support in legal reason and have, in complementary fashion, ignored valid distinctions between the presumptions applicable to single-employer and multiemployer units.
>
> • • •
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> My colleagues argue that unless a majority of Respondent's employees in 1962 desired representation by Local 86 Respondent could not lawfully have forced representation on them by joining the multiemployer unit. They further note that Respondent cannot now attack Local 86's majority status among its own employees at the time of original recognition because of Section 10(b). From this my colleagues, citing cases which deal with the presumption of majority status in single-employer units, construct two entirely distinct and severable presumptions which in turn give birth to yet a third presumption. Starting with (1) a valid presumption of majority status in the multiemployer relationship, they turn back, and (2) interweave a second presumption of former majority status in the single-employer unit based upon the 10(b) prohibition against finding conduct which occurred years ago to be unlawful. From the interweaving of these two presumptions the majority manages to conceieve yet a third presumption of current majority status in the single-employer unit which otherwise has no basis in fact or in logic. While I do believe that the Board can and should base violations of Section 8(a)(5) upon legitimate legal presumptions, a violation predicated upon a presumption arising not out of fact but out of the intermarriage of two other presumptions is, in my

> view, not a proper basis upon which to establish a violation. It must never be forgotten that an 8(a)(5) finding effectively prevents employees from exercising their right to a free choice in the selection of a collective-bargaining representative—a right these employees have never had an opportunity to exercise. *Jim Kelley's Tahoe Nugget*, 227 NLRB at 358; *Nevada Lodge*, 227 NLRB at 368.

Early on this Court held that a presumption cannot be built upon another presumption. *U.S. v. Ross*, 92 U.S. 281, 23 L.Ed. 707 (1876); *Manning v. Insurance Co.*, 100 U.S. 693, 698 (1880); *Looney v. Metropolitan R. Co.*, 200 U.S. 480, 26 S.Ct. 303, 306 (1906). Since then many Courts of Appeals have so similarly held. *Otis Elevator Company v. Yager*, 268 F.2d 137, 144 (C.A. 8, 1959); *Smith v. Fidelity Casualty Company of New York*, 261 F.2d 460, 462 (C.A. 5, 1958); *J. W. Ringrose v. W & J Sloane*, 266 F.2d 402, 404 (E.D. Pa., 1920), affd. 272 F. 445 (C.A. 3, 1921); *Smith v. Pennsylvania R. Co.*, 239 F. 103, 104 (C.A. 2, 1917); and *Hall v. Atchison, Topeka & Santa Fe Railway Company*, 349 F.Supp. 326, 330 (D. Kansas, 1972).

The Board here has gone even beyond basing a presumption upon a presumption. As Board member Walther points out, the Board has given "birth to yet a third presumption." 227 NLRB at 358 and 368. The Board's entire case and its conclusion, which the Court below followed, rest upon a presumption upon a presumption upon a presumption. The Board and the Court below treated its triple headed presumption as evidence. Without it, the Board had no basis for its conclusion.

In adopting the Board's derivative presumption approach, the Court below also ignored its own precedent. *Ariasi v. Orient Ins. Co.*, 50 F.2d 548, 552-554 (C.A. 9, 1931)

in which the Court below cited and quoted copiously from authority that a presumption is not evidence and has no probative force. The Court below based its approval of the Board's hydra-headed presumption on policy considerations. 584 F.2d at 303-304. Policy considerations cannot override the law. The principal reason courts recognize a presumption is probability. *Ref-Chem Company v. N.L.R.B.*, 418 F.2d 127, 130-131 (C.A. 5, 1969); McCormick, Evidence, § 309, p. 641.

The Board's Presumption Is One of Irrebuttable Force and Constitutes a Denial of Due Process.

Petitioners, at the Board hearing, sought to introduce evidence which would demonstrate that the Local did not in fact represent a majority of their respective employees. The Board rejected this evidence and the Court below did not deal with the issue.

In defining administrative due process, this Court said in *Hormel v. Helvering*, 312 U.S. 552, 560, 61 S.Ct. 719, 723 (1941):

> Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue . . .

Despite this Court's mandate, Petitioners here were foreclosed by the Board's rejection of their proffered evidence and by the Board's application of its presumption, which made the presumption one of "irrebuttable force." This brings into play the issue of due process. The Court below, in an earlier decision, citing with approval this Court's opinion in *Hormel v. Helvering, supra*, stated in *N.L.R.B. v. Heyman*, 541 F.2d 796 (C.A. 9, 1976) at 801:[5]

5. The Board's order was denied enforcement in that case.

> As a statute creating a presumption which operates to deny a fair opportunity to rebut would not afford due process . . . a Labor Board presumption to the same effect would also suffer shortcomings.

Also in *Heyman, supra*, the Court below held (at 801):

> . . . by coupling § 10(b) with the presumption the Labor Board would create an irrebuttable presumption having the substantive law effect that was rejected in *Local Lodge*.[6]

Here again, we have a conflict between panels of the Court below.

Moreover, the summary rejection of the proffered evidence by the Board and its application of its presumption here has the practical and actual effect of permitting the Board and the Local to stonewall any access to evidence relating to actual majority status. Thus, the Board has created an irrebuttable presumption.

This Court examined the matter of an irrebuttable presumption, hence one of substantive law, in *Manhattan General E. Co. v. Commissioner of Int. Rev.*, 297 U.S. 129, 56 S.Ct. 397 (1936) and declared (297 U.S. at 134):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress . . .

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6. The reference is to *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Appendix A

FILED AUG. 10, 1978

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. TAHOE NUGGET, INC., d/b/a JIM KELLEY'S TAHOE NUGGET, *Respondent.* HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, *Intervenor.*	No. 77-2095
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. NEVADA LODGE, *Respondent.* HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 86, *Intervenor.*	No. 77-2105

OPINION

On Application for Enforcement of an Order of
the National Labor Relations Board

Before: TRASK and ANDERSON, Circuit Judges, and GRANT,* District Judge

ANDERSON, Circuit Judge:

Pursuant to 29 U.S.C. § 160(e), the National Labor Relations Board has petitioned for enforcement of its Orders against respondents. The Board, affirming the findings made by an Administrative Law Judge in separate hearings,[1] found respondents Tahoe Nugget and Nevada Lodge violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the Act). We grant enforcement.[2]

In 1959, the Reno Employers Council (the Association), a voluntary combination of restaurant and casino employers, entered into a collective bargaining agreement with Union Local 86 (the Union).[3] Soon after it opened in 1958, Nevada Lodge joined the Association; Tahoe Nugget joined after opening for business in 1962.[4] A series of three-year contracts, the last expiring on November 30, 1974, recognized the Union and set terms and conditions of employment for all Association members. By joining the Association, both respondents recognized the Unions as bargaining representative for its employees; an election has never been held in either single employer unit or in the multi-employer unit.

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

1. In *Tahoe Nugget*, the first of the two cases to reach the the Board, the Administrative Law Judge's decision was affirmed "for the reasons set forth. . . [in the Board's Decision and Order] rather than for the reasons set forth in his Decision." We find the Board's opinion only clarifies and narrows the rationale relied on by the Administrative Law Judge. The Board's decision and order in No. 77-2095 is reported at 227 NLRB No. 72 and in No. 77-2105 at 227 NLRB No. 73.

2. At oral argument, respondents conceded the Board had jurisdiction. Our jurisdiction is clear. See 29 U.S.C. § 160(e), (f).

3. Hotel-Motel Restaurant Employees & Bartenders Union, Local 86, Hotel Restaurant Employees & Bartenders International Union, AFL-CIO.

4. The record does not show whether either respondent recognized the Union before joining the Association. Inasmuch as both respondents joined the Association soon after opening for business, it is unlikely either respondent did recognize the Union before then.

On September 17, 1974, Nevada Lodge withdrew from the Association; on October 25, it refused to recognize or bargain with the Union. Tahoe Nugget took the same action on September 18 and October 23, respectively. The withdrawals were timely.[5] In November, the Union filed unfair labor practice charges against respondents. Subsequently, each employer filed an election petition, but under established Board practice, the elections were stayed pending the outcome of the unfair labor practice charges.

The Union alleged that respondents' refusal to bargain violated section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), and that respondents subsequently interfered with the free exercise of employee rights in violation of section 8(a)(1), 29 U.S.C.§ 158(a)(1). The refusal to bargain charge was premised on the Union's presumed majority status. Respondents defended by introducing evidence to show their refusal was based on a reasonable doubt of the Union's majority.[6] The Board found respondents' proof unconvincing.

The 8(a)(1) violations charged were of two varieties: dependent and independent. The dependent 8(a)(1) charges flowed from the refusal to bargain: by refusing to bargain with the employees' bargaining representative, the employer interferes with the employees' organizational rights and thereby violates 8(a)(1), if the refusal is not justified.

5. *See generally NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

6. Evidence to show the Union was actually in the minority was also offered; but the evidence was clearly insufficient and therefore will not be discussed.

The Board upheld these charges inasmuch as the refusal to bargain had been adjudged unlawful.[7] The independent 8(a)(1) charges stemmed from unilateral wage and benefit increases instituted after the collective bargaining agreement expired. These charges were also sustained by the Board.

Respondents' primary contentions on appeal are:

1. The presumption of majority status is inapplicable; and
2. A reasonable doubt has been proved.

The presumption endorsed by the Board must be upheld unless it fails to evenhandedly further the Act's purpose.[8] The Board's factual findings must be sustained if supported by substantial evidence in the record considered as a whole.[9]

THE PRESUMPTION

To sustain an 8(a)(5) charge, the General Counsel must show the union represented a majority of the unit employees when the employer refused to bargain. The Board employs two presumptions obviating an evidentiary showing of majority status. For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent "unusual circumstances."[10] After one year, the presumption becomes rebuttable. Absent sufficient counter-vailing proof, the presumption establishes, without more, the employer's duty to bargain. *NLRB v. Tesoro Petroleum Corp.*, 431 F.2d 95, 97 (9th Cir. 1970).

Respondents contend a presumption cannot have such efficacy under rule 301, Federal Rules of Evidence.[11] Only a superficial reading of the rule supports this contention. The courts have approved the presumption's use and force in reviewing 8(a)(5) violations, both before and after the adoption of the Federal Rules of Evidence.[12]

The presumption is rebutted if the employer shows, by clear, cogent, and convincing evidence,[13] that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal.[14] Some courts view these as complete defenses;[15]

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7. In *Nevada Lodge*, an additional 8(a)(5) violation was based on respondent's refusal to bargain about a dental insurance plan. Since granting the dental plan was also found to constitute an independent 8(a)(1) violation, we do not determine whether respondent's defense of contractual waiver should have been upheld by the Board.

8. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 681 n. 1 (1944); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270, 272 (5th Cir. 1975), *cert. denied*, 423 U.S. 1016 (1975).

9. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

10. *NLRB v. Lee Office Equipment*, 572 F.2d 704, 706 (9th Cir. 1978). One such "unusual circumstance" is a radical change in the size of the unit. *Brooks v. NLRB*, 348 U.S. 96 (1954).

11. "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."
Fed. Rules Evid., Rule 301, 28 U.S.C.

12. *E.g., NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 98 S.Ct. 57 (1978); *NLRB v. Traginiew*, 470 F.2d 669 (9th Cir. 1972).

13. *Pioneer Inn Associates v. NLRB*, #77-1825 (9th Cir., July 19, 1978); *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *see NLRB v. Traginiew*, 470 F.2d at 674-75. As applied to the reasonable doubt defense, this criterion is primarily directed to the type of evidence relied upon; the standard of proof is unchanged, to wit: whether there is sufficient reliable evidence to cast serious doubt on the union's majority. *See Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489-90 (2d Cir. 1975).

14. *NLRB v. Vegas Vic, Inc.*, 546 F.2d at 829.

15. *E.g., NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 332 (6th Cir. 1973).

other courts say they simply shift the burden to the General Counsel.[16] Since the General Counsel usually relies on the presumption alone, as he did here, the distinction is primarily academic.

Proving minority status is a straightforward factual question. When the employer seeks to rely on the less exacting standard of reasonable doubt, he must also show the doubt was entertained in good faith. *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975).

Respondents sought to substantiate their factual defense by showing the Union did not enjoy majority support at the time of voluntary recognition. The showing was disallowed as time barred.

In *Bryan Manufacturing*,[17] the Supreme Court held that the six-month statute of limitations for filing unfair labor practice charges contained in § 10(b) of the Act can also act as an evidentiary bar. The issue arose when an employer recognized a minority union and entered into a collective bargaining agreement with it. No unfair labor practice charges were filed for ten months. The Board upheld the charges, reasoning that execution of the agreement was a continuing violation. The Supreme Court reversed, holding that § 10(b) precluded a challenge to the union's majority position.

Two situations were differentiated. The Court said when events within the six months preceding the filing of charges "may constitute, as a substantive matter, unfair labor practices," evidence showing earlier unfair labor practices

16. *E.g., Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974).

17. *Local Lodge No. 1424 International Association of Machinists, etc. v. NLRB*, 362 U.S. 411 (1960).

is admissible to clarify the more recent events. When, however, the recent events violate the Act only if an earlier unfair practice occurred, the prior events are not merely evidentiary and evidence thereof is inadmissible. The facts in *Bryan Manufacturing* fell into the second category because enforcement of the agreement was illegal only if its execution were an unfair labor practice.

Here we are presented with the other side of the coin. Respondents intended to use the evidence defensively to prove their conduct was lawful. Respondents argue the evidence clarifies their subjective motivation and is therefore admissible to prove their good faith doubt defense.

In *NLRB v. Traginiew, Inc.*, 470 F.2d 669 (9th Cir. 1972), this court held that evidence of an unfair labor practice that occurred beyond the 10(b) period could not be admitted in defense of a refusal to bargain charge. *Accord, Lane-Coos-Curry-Douglas Counties Building and Construction Council, AFL-CIO v. NLRB*, 415 F.2d 656, 659 n. 7 (9th Cir. 1969). Other courts agree that under *Bryan Manufacturing* a defunct unfair practice claim cannot be revived to defend subsequent charges. *E.g., NLRB v. District 30, United Mine Workers of America*, 422 F.2d 115, 122 (6th Cir. 1969), *cert. denied*, 398 U.S. 959 (1970). In *Traginiew*, however, the employer had not attempted to avail himself of the good faith doubt defense, but only tried to prove the union was in the minority. Consequently, the court did not consider the precise question raised by respondents.[18]

18. Compare majority and dissenting opinions in *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973) for contrasting views on what *Traginiew* portends here. *See also NLRB v. Denham*, 469 F.2d 239 (9th Cir. 1972), *vacated*, 411 U.S. 945 (1973).

In *Daisy's Originals, Inc. of Miami v. NLRB*, 468 F.2d 493, 501 (5th Cir. 1972), the court did apply the *Bryan Manufacturing* rule

The defense respondents press has two parts:

1. objective facts sufficient to support a reasonable doubt; and
2. the employer's good faith.[19]

NLRB v. Cornell of California, Inc., #76-1545 (9th Cir., June 14, 1978). The Sixth Circuit has held in similar circumstances that evidence otherwise time barred is admissible to substantiate the second part of the defense presented here.

In *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973), the employer sought to defend refusal to bargain charges by showing that union authorization cards, obtained more than six months previously, were procured fraudulently. The court held that evidence to support this defense was admissible. The employer does not resurrect a stale claim by showing the original authorization cards were obtained through fraud, the court reasoned, but only proves that the employer acted in good faith.

We think this misperceives the essence of the good faith criterion. The good faith criterion is ordinarily satisfied if, at the time the employer challenges the union majority,

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to disallow an attack on the union's initial majority when the employer had raised the reasonable doubt defense. There, however, the focus was on the effect of certain unfair labor practice, and it is unclear whether the distinction pressed by respondents was raised.

19. These criteria comprise two corollaries:
    1. the perceived decline in union support must not be attributable to employee [sic] misconduct; and
    2. evidence showing the union does enjoy majority support must also be considered.

See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 687 (1944); ***Frank Bros. Co. v. NLRB***, 321 U.S. 702 (1944); ***NLRB v. Sky Wolf Sales***, 470 F.2d 827, 830 (9th Cir. 1972); ***Fremont Newspapers, Inc. v. NLRB***, 436 F.2d 665, 671 (8th Cir. 1970); ***Terrell Machine Co. v. NLRB***, 427 F.2d 1088, 1090 (4th Cir. 1970), ***cert. denied***, 398 U.S. 929 (1970).

the employer has knowledge of the facts which give a reasonable basis for doubting the union's majority.[20] The good faith criterion is unconcerned with the employer's subjective motivation; its focus is empirical and objective. *See NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 98 S.Ct. 57 (1978). What the employer knew is determinative, not why he challenged the union's position. *See Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974); *NLRB v. Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966); Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 Tul. L. Rev. 961, 984 (1973).

In a parallel context, the Supreme Court has deemphasized motivation. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the court endorsed the Board's disregard of an employer's subjective motivation in election cases:

> "Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance

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20. *See Lodges 1746 & 743, Int'l. Ass'n. of Machinists & Aerospace Workers v. NLRB*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970) (good faith can be inferred from employer's knowledge of objective grounds). We are not confronted here with a question as to the timeliness of the employer's refusal to recognize. See text at n. 5. Assumably, this is a separate consideration. *But see id.*

that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength." *Id.* at 594.[21]

See Komatz Construction, Inc. v. NLRB, 458 F.2d 317, 326 (8th Cir. 1972) ("In view of the demise in *Gissel Packing* of the subjective test of an employer's good faith doubt, 395 U.S. at 608, 89 S.Ct. 1918, the proper test for rebuttal of the presumption is whether there is objective evidence sufficient to warrant a good faith doubt of the union's majority. . . .")

In contrast to the situation in *Gissel Packing*, the employer must give "affirmative reasons" for challenging the union's position when asserting the reasonable doubt defense. The added burden is justified here because the Union's majority has already been established once. The Act favors stability in bargaining. Therefore, the employer must affirmatively defend his decision when he disrupts the existing relationship whereas he must only proceed in good faith when refusing to recognize the union initially.[22]

Our construction of the reasonable doubt defense also comports with the Act's emphasis on neutral employer-union conduct to ensure employees unfettered freedom regarding their organizational desires. Congressional policy with respect to unfair practices is directed to con-

21. In *Gissell*, the court also approved the *Cumberland Shoe doctrine*, stating:

"We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry."

395 U.S. at 608.

22. The two conditions enumerated in the quote from *Gissel Packing* are functionally equivalent to the good faith facet of the reasonable doubt defense. See n. 19, *supra*, and accompanying text.

trolling misconduct: it does not require the employer to embrace the union movement's precepts. Even when anti-union motivation is a necessary element of the unfair labor practice, conduct is still the key. The subjective inquiry is necessary to determine whether the employer has acted impartially; the presence of anti-union animus is immaterial unless it prompts the misconduct. *See NLRB v. Tayko Industries, Inc.*, 543 F.2d 1120 (9th Cir. 1976); *Conolon Corp. v. NLRB*, 431 F.2d 324 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971).

We hold the employer is free to act on the objective grounds before him, regardless of his underlying motivation. If union support is lacking, the employer's action actually furthers the cause of employee democracy by overcoming the inertia which helps maintain the status quo.[23] Since the employer's action is not in derogation of employee rights, his subjective motivation is important only evidentially.[24] In sum, when challenging the union

23. *See Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1390 (D.C. Cir. 1976).

24. "If the employer's discriminatory conduct is inherently destructive of important employee rights, then no proof of subjective anti-union motivation is necessary to support the charge. However, if the destructive impact on employee organizational rights is comparatively slight, the employer may defend against the charge by introducing evidence showing that the conduct was motivated by business or other legitimate considerations. If the employer can produce such information, the aggrieved party may, in turn, submit evidence showing a substantial anti-union motivation. The showing of a substantial anti-union motivation is sufficient to support the charge, even if some legal motivating factors are present. Thus, substantial evidence from which the Board can infer the motivation of the employer at the time of the discharge may be essential to the defense to or proof of the charge." (footnotes omitted) Note, *The Labor Statute of Limitations: The Bryan Manufacturing Co. Case Revisited*, 55 B.U.L. Rev. 598, 618 (1975).

If, but only if, the employer can show the union's majority is truly in doubt, the situation confronted is at the opposite end of the spectrum from the situation where the employer's conduct is

majority, good faith is demonstrated if the employer is aware of the facts manifesting lack of union support and employer misconduct did not contribute to the loss of support.

Our conclusion is buttressed by pragmatic considerations. Administratively and evidentially, testing objective facts is simpler and more precise than probing an employer's mind.[25] Also, an objective construction of the reasonable doubt defense eliminates uncertainty for the employer and reduces the risk of an erroneous determination if an unfair practice charge is filed. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

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inherently destructive of employee rights. It follows that not only is proof of anti-union motivation then unnecessary, but it is immaterial to the charge. We emphasize, however, that the employer must have ample evidence in support of his doubt before we can condone this assumption of the cause of employee democracy.

25. Christensen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L.J. 1269 (1968); 55 B.U.L. Rev., *supra* note 24, at 623; Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 Tul. L. Rev. 961, 981-87 (1973).

Though knowledge does entail ascertaining what is in the employer's mind, the inquiry ceases there. Inferences are unnecessary. If the total of the employer's knowledge and ignorance is sufficient to support a reasonable doubt, the defense is established. On the other hand, when the Act prohibits conduct for an unnlawful purpose, the Board must also infer why the employer acted. Theoretically, the good faith defense could require another strictly subjective finding based on inference, i.e., whether the employer actually believed certain facts which support the asserted reasonable doubt. But the Board has applied an objective test: the doubt is unreasonable if premised on unreliable evidence regardless of the employer's subjective belief. We think the converse is also true. We have found no case holding that an employer could not assert a reasonably based doubt because, though aware of the supporting facts when bargaining was refused, he unreasonably chose to disbelieve them. Thus, we think good faith is directed only to timing:

> the reasonable grounds must be known at the time the refusal occurs. Motivation and subjective belief are irrelevant except as they may shed light on the sufficiency of the evidence. *See NLRB v. Vegas Vic, Inc.*, 546 F.2d at 829.

When motivation is an issue, evidence of a prior unfair practice is admissible.[26] Subjective motivation is not, however, an element of the reasonable doubt defense. Consequently, the evidence was inadmissible, and the alleged prior unfair practice did not constitute an objective ground for challenging the Union's bargaining status.[27]

The employers argue that placing on them the burden of refuting the presumption of majority status is unfair because the Union has superior access to the information regarding Union support. The effect, respondents conclude, is that they are forced to assume the risk of erroneous determinations. We agree: the employer usually does have inferior access to the relevant information and may risk further penalty in garnering additional data.[28] Yet we think the burden is fair.[29]

In refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious cham-

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26. *United Packinghouse, Food & Allied Workers International Union v. NLRB*, 416 F.2d 1126, 1131 n. 8 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969); *NLRB v. Patterson Mendhaden Corp.*, 389 F.2d 701, 702-03 (5th Cir. 1968); *NLRB v. Stafford Trucking, Inc.*, 371 F.2d 244, 246-47 (7th Cir. 1966); *Paramount Cap Mfg. Co.*, 260 F.2d 109 (8th Cir. 1958).

27. We appreciate this requires the employer to disregard evidence he may know to be true. But this consequence of the *Bryan Manufacturing* rule is equally applicable when the employer determines he can disprove the union's majority status or takes any other action in reliance on inadmissible evidence.

28. *NLRB v. Gissel Packing Co.*, 395 U.S. at 609-10; *Automated Business System v. NLRB*, 497 F.2d 262, 270-71 (6th Cir. 1974) (quoting *Stoner Rubber Co.*, 123 NLRB 1440); *see NLRB v. Fulfmont Hotel Co.*, 362 F.2d 588, 590-91 (5th Cir. 1966). *But see NLRB v. H. P. Wasson & Co.*, 422 F.2d 558 (7th Cir. 1970) (employee poll not coercive).

29. One factor contributing to our conclusion is that an objective construction of the reasonable doubt defense, as we have adopted herein, lightens the evidentiary burden imposed on an employer who is charged with an unfair labor practice.

pion of its employees, a role no one has asked it to assume.[30] The employees were free to petition for decertification; here, they never did. Respondents were also free to petition for an election, the preferred method for resolving majority disputes, but neither did until much later. When the employer chooses to unilaterally disrupt an established bargaining relationship without an election, the threat to industrial peace must be counterbalanced by good cause.[31] When the employer has doubts, the goal of the Act would be better served by filing an election petition.[32] Requiring the employer to show that his refusal to bargain was reasonable fairly allocates the burdens and concomitant risks.[33]

Respondents also argue the *Bryan Manufacturing* rule makes this an irrebuttable presumption. The argument confuses the presumption with its factual predicate. § 10(b) does preclude respondents from showing the Union was in the minority when the Union was first recognized, but the presumption pertains to the Union's majority at the time the employer refused to bargain. The presumption

30. "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it."
Brooks v. NLRB, 348 U.S. at 103.
See NLRB v. Lee Office Equipment, 572 F.2d at 707.

31. *Retired Persons Pharmacy v. NLRB*, 519 F.2d at 490 (balance between industrial peace and free choice weighed differently when employer is asserting rights of its employees).

32. Although we recognize that an election petition may cause delay and create other practical problems, the election process is still preferable. *NLRB v. Gallaro*, 419 F.2d 97, 101 (2d Cir. 1969); *see Brooks v. NLRB*, 348 U.S. at 104 & n. 18.

33. *Retired Persons Pharmacy v. NLRB*, 519 F.2d at 491; *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1139 (7th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974) (burden on employer "not severe"); *See NLRB v. Gallaro* 419 F.2d at 101.

may be rebutted; the only fact conclusively established is the fact that triggers the presumption.

Respondents' reliance on *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976) is misplaced. There the contract had been invalidated by a prior judicial decree; therefore, the presumption was inapplicable.

> "Majority representation is not the issue in this case; but what was and is the issue is the effect of the district court rescission on the presumption of validity utilized by the Board."
> *Id.* at 800.

See Pioneer Inn Associates v. NLRB, #77-1825 (9th Cir., July 19, 1978). The Board cannot ignore a judicial decree; it must ignore evidence which the Supreme Court has held to be inadmissible.

WITHDRAWAL FROM THE UNIT

The next issue is whether the presumption survives dissolution of the multi-employer unit. Three interests embraced by the Act shape our decision:

1. employee free choice;
2. stability in bargaining; and
3. the deference we owe to Board expertise.

See Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1140 (9th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974). We conclude the Board did not abuse its discretion in balancing free choice and stability when it determined that, in this instance, freedom of choice must subserve the goal of industrial peace. *See id.* at 1138.

Multi-employer units are formed by mutual consent of union and employer. But their power is limited: voluntary recognition of a union which does not enjoy majority sup-

port in the single employer unit is an unfair labor practice. *See NLRB v. Local 210, International Brotherhood of Teamsters, etc.*, 330 F.2d 46 (2d Cir. 1964). Nevertheless, either party may withdraw from the multi-employer unit without ascertaining the effect on union majority in the respective units.

Relying on Member Walther's dissenting opinions, respondents assert the presumption is inapplicable once the employer withdraws from the multi-employer unit.[34] Since recognition was based on majority support within the larger unit, respondents argue, the factual predicate of the presumption, prior majority status, is inapposite when applied to the single employer unit. Respondents point out: no election was ever held; the Union was not recognized until the employers joined the Association; no separate contracts were signed; and withdrawal from the larger unit was timely. Under these facts, respondents conclude, the presumption is derivative, supported only by policy far-removed from actual fact; therefore, it should not be weighed heavily, if at all.

The reasoning of the Board majority persuades us that respondents' argument must fail. Respondents' argument misconstrues the presumption in two ways. First, the presumption is rooted in the employer's appraisal of union strength among its own employees. Second, the basis of the presumption is primarily policy, not probability; it is a vehicle for maintaining industrial peace.

In many instances, the presumption originates with an election among the employees of several employers. When the bargaining representative is chosen in a multi-employer-

34. In the alternative, respondents contend withdrawal provides sufficient reason for doubting the Union's majority. We find the arguments indistinguishable and discuss only the first.

unit election, the factual premise is derivative: majority status in the single employer unit is inferred from the union's victory in the multi-employer election. Although the inference is reasonable,[35] some reviewing courts have deemed it too speculative to support the presumption after the larger unit has dissolved.[36] Here, however, no election was held; the Union was voluntarily recognized.

When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued mem-

35. *See Zim's Foodliner, Inc. v. NLRB*, 495 F.2d at 1136-42; *NLRB v. Armato*, 199 F.2d 800 (7th Cir. 1952).

36. In *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965), the Sixth Circuit did hold that withdrawal from a multi-employer unit vitiated the presumption despite the existence of a separate contract between the union and Kaase. But in that case the union's position as exclusive bargaining representative of the Kaase employees originated with an election in the multi-employer unit. No evidence showed the Kaase employees themselves ever favored the union; thus, the fact of majority status in the single-employer unit had never been established, as it had been here by the employer's voluntary recognition. There were other distinguishing facts. The union, the court noted, controlled Kaase employees through a union security clause and represented them in a high-handed manner. Kaase had been sold to new owners, and the size of its work force had been halved. Also, the issue arose in the context of conflicting representational claims and blatant unfair labor practices by Kaase and the rival union.

The court specified its holding was limited to the unusual circumstances presented. Though we express no view on the holding, we distinguish it on these bases.

See also NLRB v. Downtown Bakery Corp., 330 F.2d 921 (6th Cir. 1964); *Ref-Chem Co. v. NLRB*, 418 F.2d 127 (5th Cir 1969).

bership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining.[37] The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation.

A secondary consideration supporting the presumption's continued vitality is its grounding in policy. By preserving the status quo, the presumption ensures the Act's most valued objective: industrial peace.[38] Respondents' assertion —that the inference of majority support based on voluntary recognition a decade before is too attenuated to survive withdrawal from the Association[39]—assumes the presumption is merely an evidential tool based wholly on probability. The presumption, however, also subsists for policy reasons.

Presumptions often function to further social, economic, or other policies, distinct from the fact presumed, C. McCormick, *Law of Evidence* § 343 (Cleary ed. 1972). *But See Ref-Chem Co. v. NLRB*, 418 F.2d 127, 128-29 (5th Cir. 1969). In assorted contexts, the Board has used presumptions to stabilize labor-management relations. Inasmuch as primary responsibility for reconciling the inherent conflict between employee rights and bargaining stability has been

37. There was no evidence that prior to withdrawal, respondents doubted the Union majority but continued to recognize the Union because of their membership in the larger unit which was then the appropriate unit for bargaining.

38. *See Brooks v. NLRB*, 348 U.S. 96 (1954).

39. As a factual matter, this assertion presents a close question. The sentiments of the present employees have never been tested. On the other hand, they have not objected to the Union's representation by filing a decertification petition. See The Employer's Evidence, *infra*.

entrusted to the Board, we determine only whether adoption of the presumption strikes a fair balance.[40]

In the single-employer context, the balance struck by the Board has been approved by the Supreme Court even though majority support was not demonstrable. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).[41] As stated previously, the presumption here, though perhaps distinguishable, stems from the single employer unit. Other circuits have approved Board presumptions in analogous circumstances when majority support was not readily deducible. *E.g., Zim's Foodliner, Inc. v. NLRB*, 495 F.2d at 1136-38. *See also Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944). The Board may have concluded that the potential for abuse inherent in the employer's right to unilaterally withdraw from the Association justifies the incursion on employee freedom.[42] If an employer could routinely negate the presumption of union majority status by withdrawing from a bargaining association, unions might refuse to consent to multiple party bargaining and this effective device for promoting industry-wide peace

40. *See NLRB v. Local Union No. 13, International Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 98 S.Ct. 651, 660 (1978); *cf. Daisy's Originals, Inc. of Miami v. NLRB*, 468 F.2d at 503 (responsibility for balancing employee freedom against need to remedy effects of employer misconduct is Board's, subject to judicial review).

41. In *Burns* a successor employer hired 27 employees from the previous unit and added 15 new employees. Less than four months before, an election in the prior unit had been held and a bargaining representative certified. The court held the one-year irrebuttable presumption applied despite the change in employers and make-up of the unit.

42. In *Nevada Lodge*, withdrawal from the Association was motivated, in part, by the belief that pockets of Union strength within the Association might sustain the Union's overall majority. Under respondents' view, the employer could threaten withdrawal to enhance its bargaining power or could disrupt an established bargaining relation to undermine union authority.

would be lost. Since industrial peace is no less desirable in multi-employer units and the election alternative is available to both employer and employee, we think the Board has not abused its discretion.

THE EMPLOYERS' EVIDENCE

Both the Administrative Law Judge and the Board found respondents had failed to introduce evidence sufficient to support a reasonable doubt. The credibility determinations made by the Administrative Law Judge and approved by the Board were fully warranted; in fact, conflicts in the evidence were rare, and virtually all of the testimony was credited. We pay great deference to the inferences drawn by the Board from the credited testimony because Board members' expertise and experience in labor-management relations is an invaluable asset to the task.[43] Nonetheless, derivate inferences which are tenuous, irrational, or unwarranted do not constitute substantial evidence and will be overturned on appeal. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1079 (9th Cir. 1977).

Seven factors relied upon by respondents are discussed below. They are:

1. employee discontent,
2. turnover,
3. union inactivity,
4. low membership,
5. financial difficulties of the union,
6. bargaining history, and
7. admissions.

After analyzing each individually, their combined effect is considered. We note at the outset that in most decisions

43. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1079 (9th Cir. 1977); *see NLRB v. Miller Redwood Co.,* 407 F.2d 1366, 1369 (9th Cir. 1969).

upholding the reasonable doubt defense the employer could point to at least one factor which was clearly referable to a decline in union support.[44] In many instances, this factor alone did not constitute sufficient evidence to justify the refusal to bargain, but did provide an unequivocal tie between the other evidence and the ultimate fact—whether union support had dwindled to a minority.[45]

All of the factors established by respondents are equivocal. They may represent a loss of union support, yet may be explained by other reasons. For example, low membership may show the union is losing support as bargaining representative, or it may simply indicate unwillingness to participate in union activities. The Board has consistently held that no single equivocal factor is sufficient to sustain the good faith doubt defense, but that each will be accorded some weight when the total effect of the evidence is assessed.

When the Board looks to the cumulative force of the evidence, the factors are reconsidered and weighed against the force of the presumption. If unexplained, the cumulative inferential weight of these equivocal factors might suffice to establish that the refusal to bargain was reasonable.[46] Derivate inferences of union minority status cannot

44. *E.g., National Cash Register Co. v. NLRB,* 494 F.2d 189 (8th Cir. 1974) (decertification petition); *NLRB v. Gallaro,* 419 F.2d 97 (2d Cir. 1969) (7 of 10 employees petitioned for decertification); *Lodges 1746 & 743, etc. v. NLRB,* 416 F.2d 809 (D.C. Cir. 1969) (union admission that majority support lacking). *See also NLRB v. Cornell of California, Inc.,* #76-1545 (9th Cir., June 14, 1978) (reliance on "identifiable acts" of majority preferred).

45. *See, e.g., Dalewood Rehabilitation Hospital, Inc. v. NLRB,* 566 F.2d 77, 80 (9th Cir. 1977).

46. But we have found no cases in which the reasonable doubt defense was sustained based solely on equivocal evidence. Common to each case was the presence of at least one factor clearly referable to a lack of majority support.

be disregarded upon mere speculation; to ignore their cumulative effect would be irrational and unwarranted. We do not say the Board has deviated from its stated policy here, but merely outline the proper steps to ensure they are followed.

In reviewing the facts, we are guided by several evidentiary considerations:

1. Evidence manifesting declining union support is more pertinent than evidence showing union support is low.
2. In gauging union support, the employer is often without direct evidence of minority status, and therefore he may properly rely on reasonable inferences from the available information. But that does not justify wishful speculation on the employer's part.
3. When information signifying lack of union support would be readily available if union support had eroded, an insubstantial showing by the employer may be convincing proof the union has majority support.
4. When the employer has consistently demonstrated impartiality regarding employee representation, his decision may be some evidence that the grounds relied on are reasonable.

With these thoughts in mind, we examine the particular facts before us.

1. Employee Discontent

Reports of employee complaints about the Union were one reason asserted by respondents for deciding the Union was in the minority. Much of the evidence to show employee dissatisfaction with the Union was speculative, conjectural, and vague. Often it was hearsay or based on management's

evaluation of employee sentiment. Its probative weight is accordingly slight.[47]

The dissatisfaction testified to here did not, for the most part, amount to repudiation.[48] Many an employee complains of his job without ever contemplating quitting, and remarks to management may be affected by a desire to curry the employer's favor.[49] Absent other activity which would confirm that the reported complaints were expressions of repudiation, the two cannot be equated.[50] Here, the complaints were not vociferous, a petition for decertification had not been filed, and no organized opposition to the Union had formed.[51] Furthermore, the number of discontented employees was insubstantial.[52]

In summary, the evidence was unreliable and the inference from it tenuous. Consequently, we afford it almost no

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47. *See Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970), (reliance on vague, unidentified reports of employee discontent unwarranted); *Allied Industrial Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 881-82 (D.C. Cir. 1973).

48. The evidence in *Nevada Lodge* was stronger; some of it could be characterized as a repudiation of the Union's representation. An overly-stringent, technical definition of what statements constitute repudiation serves no purpose. The evidence must be evaluated with common sense and an appreciation for its context. We doubt employees often explicitly declare, "I repudiate the union."

49. Some of the complaining employees were dues-paying Union members or subsequently joined the Union.

50. *See Retired Persons Pharmacy v. NLRB*, 519 F. 2d 488, 490 (2d Cir. 1975); *cf. NLRB v. Frick Co.*, 423 F.2d 1327, 1333-34 (3d Cir. 1970) (strikers return to work equivocal; Board to determine if, under all the circumstances, return indicates abandonment of union).

51. *See Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1036-37 (8th Cir. 1976) (anti-union committee deemed objective evidence supporting employer's reasonable doubt).

52. *See NLRB v. A. W. Thompson*, 525 F.2d 870, 873 (5th Cir. 1976), *cert. denied*, 429 U.S. 818 (1976); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1092 (8th Cir. 1969).

weight.[53] The absence of more concrete evidence of employee discontent, particularly the filing of a decertification petition, is actually more persuasive.

2. Turnover

Respondents assert there is no basis for concluding that the present complement of employees shares the same attitude towards union representation as held by their predecessors a decade before. The annual turnover was consistently high for both employers. Thus, the work force at the time of the employers' refusal was completely different.[54]

High turnover, by itself, is insufficient to justify a refusal to bargain except when caused by employee discontent with the union.[55] The Board has adopted a presumption that new employees support the union in the same ratio as their predecessors.[56] Despite the legitimacy of this presumption, high turnover can be considered when other factors show declining union adherency.[57]

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53. *See* Seger, *supra* note 25, at 992-93.

54. *See NLRB v. King Radio Corp.*, 510 F.2d 1154 (10th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975), where the number of employees had risen to 876 from 343 and in a five-year period since certification, 4214 persons had been hired and 3423 terminated. The court held the turnover did not afford reasonable grounds for doubting the union's majority. *Id.* at 1156.

55. *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d at 1091. This is particularly true when high turnover is prevalent in the industry. *NLRB v. A. W. Thompson, Inc.*, 525 F.2d at 872; *NLRB v. Hondo Drilling Co., N.S.L.*, 525 F.2d 864, 868-69 (5th Cir. 1976), *cert. denied*, 429 U.S. 818 (1976); *see NLRB v. Hondo Drilling Co.*, 428 F.2d 943 (5th Cir. 1970).

56. This presumption can be rebutted, for example, by showing a decline in the ratio of checkoffs to pro-union votes. *See Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546 n. 6 (7th Cir. 1970).

57. *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1390 (D.C. Cir. 1976) (dictum); *Star Mfg. Co. Division of Star Forge, Inc. v. NLRB*, 536 F.2d 1192, 1195-96 (7th Cir. 1976).

3. Union Inactivity

In the years immediately preceding respondents' refusal to bargain, the Union had not processed any grievances. The significance of this fact is questionable, since there was no testimony showing any grievances were warranted.[58] When, as here, the union and the employer have established an amicable relationship over several years, contract violations may be the exception. Witnesses for both employers testified they abided by the collective bargaining agreement and were unaware of any contract violations.

There was, however, other evidence of Union inactivity. Union agents inspected the business premises infrequently. No employees attended a meeting called by the Union[59] in the spring of 1974. Yet there is no evidence the Union failed to fulfill its responsibilities under the contract or breached its duty of fair representation.[60] Union inactivity is an objective ground which may contribute to an employer's conclu-

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58. When Respondent Nevada Lodge decided to enforce the company's anti-nepotism policy, the Union effected the rehire of five of the seven employees discharged. When employees complained that their ten-minute breaks and half-hour lunches were not being provided, the Union filed a grievance with the Nevada Labor Commission. The grievance was subsequently resolved.

After the refusal to bargain, two written grievances were filed by the Union. This evidence, of course, is irrelevant.

59. This was a meeting of all employees in the Lake Tahoe area. When the Union called a meeting to discuss matters affecting Nevada Lodge employees, fifteen or eighteen employees attended (see n. 16, *supra*). *Cf. NLRB v. Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11 (4th Cir. 1971) (only 2 of 140 employees attended union meetings and only 2 plant visits by union: good faith doubt found to exist, but finding premised on filing of petition for decertification).

60. The Union negotiated successive bargaining agreements with the Association; there was no evidence the Union had ever been charged with an unfair labor practice by respondents or any employees.

sion that union support is lacking,[61] but the showing here was de minimis.

4. Low Membership

Among bar and culinary employees in the Tahoe basin, Union membership was relatively low. For several reasons, this evidence is only marginally relevant.[62] Low membership was never tied to respondents' employees. Also, employees may favor union representation, but choose not to join, *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 98 S.Ct. 57 (1978); this disparity is emphasized in a right-to-work state, such as Nevada. *See Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970).

5. Financial Difficulties of the Union

During 1974, the Union was placed in trusteeship, and a campaign to organize more workers was launched. This says little about support within the subject units. The Union was solvent. Its financial problems may have stemmed from overextension without sufficient financial support. Employees who desire representation may be unwilling to pay for it. The organizational campaign only shows a desire for more members, either within the units represented or from units as yet unrepresented. The record shows the Union undertook the campaign because higher membership would help the Union at the bargaining table; thus, the expanded

61. *E.g., Ingress-Plastene v. NLRB*, 430 F.2d 542 (7th Cir. 1970) (union processed none of 32 grievances filed, failed to recommend promotions or designate employees for super-seniority, and abdicated its responsibilities regarding safety in the workshop).

62. The obverse is also true: high membership may be an unreliable barometer of pro-union sentiment. *See Teamsters Local Union 769 v. NLRB*, 532 F.2d at 1390.

organizing efforts were proper Union activity on behalf of the employees it then represented.

6. Bargaining History

Relations between the Union and employer were amicable for many years. By deemphasizing subjective motivation, we concomitantly discount the importance of this factor. Seger, *supra* note 25, at 994. Nonetheless, it may show the employer's decision was impartial and, by inference, reasonable.

The history of employee-union ties may be more significant. There was no evidence here of employee-led challenges to the Union's representation or of abdication by the Union.

7. Admissions

Neither the Union nor the employer had made damaging statements about their assessments of Union support.[63] In *Nevada Lodge*, respondent's attorney was "to use any necessary method to get us disassociated from the union." This fact may be helpful in evaluating credibility, and it does imply subjective bad faith. Since the evidence was generally credited and this is not the unusual case where subjective motivation is an important factor, we find this evidence insignificant.[64]

63. The testimony of Alfred Staff, President of the Union, from July 1973 to June 7, 1974, was material only to the question of the Union's actual majority; respondents were apparently unaware of the facts testified to by Staff when they refused to bargain.

64. Another ground relied on by respondents was that the collective bargaining agreement did not contain a clause authorizing dues checkoffs or a union security clause. This only confirms the Union lacked bargaining power with the employers, a fact the Union admitted.

Respondents also contend the reduction in unit size consequent on withdrawal from the Association should be considered. Reduction

8. Cumulative Effect of the Evidence

None of the evidence is wholly referable to a decline in Union support within the relevant units. Most of the evidence indicates the Union had equivocal support in the Lake Tahoe area. Some of the evidence is subjective; the inferences of loss of Union support are ambiguous. Before unilaterally disrupting the bargaining relationship, an employer must obtain more reliable evidence of lost support.

We therefore affirm the Board's determination that respondents violated sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union. After considering the record as a whole, we also affirm the Board's finding that respondent Nevada Lodge independently violated § 8(a)(1) by unilaterally changing working conditions to induce its employees to abandon the Union.

The Board's Orders are enforced.

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in unit size is not sufficient to justify a refusal to bargain, *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d at 1140, and in light of the presumption's relation to the single employer unit discussed previously, this fact does not contradict the inference of majority support.

Appendix B

Filed October 20, 1978

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. TAHOE NUGGET, INC., d/b/a JIM KELLEY'S TAHOE NUGGET, *Respondent,* HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 86, *Intervenor.*	No. 77-2095
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. NEVADA LODGE, *Respondent,* HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 86, *Intervenor.*	No. 77-2105

ORDER

Before: TRASK and ANDERSON, Circuit Judges, and GRANT*, District Judge

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*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.